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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-540

LOUIS CRAMER and MINNIE K. CRAMER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Louis Cramer and Minnie K. Cramer pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 23, 1971 in this proceeding.

Opinion Below

The opinion of the Court of Appeals reprinted in the appendix hereto is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1971 by a divided court, Circuit Judge Oakes dissenting. A timely petition for rehearing was denied on September 16, 1971 by a divided court, Circuit Judge Oakes dissenting. A timely petition for rehearing *in banc* was also denied on September 16, 1971 after "a vote of the circuit judges having been taken . . . at the request of a judge in active service . . . Judges Feinberg, Oakes and Timbers dissent from the denial of rehearing in banc." A stay of the mandate pending determination of this petition for certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Was it error for the Court below to affirm the action of the District Court in failing to strike the testimony of the special agent of the Internal Revenue Service, the principal witness for the respondent, and to order a new trial where, after request by the petitioners to produce his grand jury testimony and a direction of the trial court to do so, it appeared that the grand jury testimony was not recorded under an admitted policy that "as of the date of the indictment . . . March 27, 1968, minutes of the grand jury proceedings were not taken in this district except in major criminal cases?" (A 2380a)

   (a) Was such action of the Court below contrary to the principles laid down by this Court and contrary to the rights of due process and confrontation guaranteed under the Fifth and Sixth Amendments to the Constitution of the United States?

(b) Did the Court below further err in announcing a vague standard that it would reverse a conviction if the grand jury testimony of a witness was not recorded only where there was proof of "prosecutorial misconduct" when:

(i) The admission of the prosecutor that the grand jury recorded the testimony in some cases and not others reflected sufficient misconduct to warrant the reversal; and

(ii) Under previous decisions of this Court the suppression of evidence favorable to an accused has been held to be a violation of due process "irrespective of the good or bad faith of the prosecutor"; and further

(iii) The standard described by the Court below to reverse the conviction, i.e., *"prosecutorial misconduct,"* was so vague, uncertain and impossible to prove as to constitute a violation of the principles announced previously by this Court, as well as due process under the Fifth Amendment of the Constitution?

2. Where knowledge of the contents of the income tax returns and wilfulness were essential elements of the offenses charged under 26 U.S.C. §§ 7201 and 7206(2), was it error to affirm the conviction upon a charge by the trial court to the jury, that if the jury found beyond a reasonable doubt that the petitioners signed the tax returns, "the jury may draw the inference and find that such defendant had knowledge of the contents of such return?"

Statutory Provisions Involved

Title 26, United States Code, §7201:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Title 26, United States Code, §7206(2):

> "Any person who—
>
> (2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, . . ., which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, . . .;"

Title 26, United States Code, §6064:

> "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."

Rule 6(d), Federal Rules of Criminal Procedure:

> "(d) Who May Be Present. Attorneys for the government, the witness under examination, inter-

preters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

Fifth Amendment, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement of the Case

Petitioners, husband and wife, were tried below on an indictment returned on March 27, 1969, containing four counts. Counts 1 and 2 charged an attempt to evade taxes under Section 7201, Title 26, U.S.C. upon joint income tax returns (Form 1040) filed for the calendar years ending December 31, 1962 and 1963. The deficiencies in tax alleged in those counts were predicated upon alleged errors in their partnership tax returns (Form 1065) for the same years which came from the items specifically set forth as false material matter in Counts 3 and 4 under Section 7206(2), Title 26, U.S.C.

In Counts 3 and 4 petitioners were charged with wilfully aiding and assisting the preparer of the Cramer Auto Parts partnership returns for the calendar years ending December 31, 1962 and 1963 as follows:

(a) Overstating their purchases by $47,000.00 in 1962 and $30,000.00 in 1963;

(b) Failing to report purchase discounts of $5,427.22 in 1962 and $5,323.02 in 1963;

(c) Overstating sales returns and allowances of $21,435.91 in 1962 and $19,499.02 in 1963;

(d) Overstating New York disability and group hospital expenses of $975.98 in 1962 and $644.00 in 1963.

By making these adjustments to the partnership income, the respondent charged under Count 1 that the Cramers' joint taxable income for the calendar year December 31, 1962 was increased from $43,832.63 to $118,672.24 upon which it was claimed an additional tax was due of $50,330.84; under Count 2 for December 31, 1963, the tax-

able income was increased from $46,644.23 to $102,110.93 upon which it was claimed an additional tax was due of $36,859.00.

Petitioners did not dispute the factual allegations of three of the four items set forth in Counts 3 and 4, and for that matter the tax deficiencies due therefrom under Counts 1 and 2, but defended against the crimes charged in those respects on lack of wilfulness and innocent reliance on others who were responsible for the keeping of the partnership books and records and the preparation of their partnership and individual tax returns.

Petitioners disputed, however, the claimed overstatements of their purchases in Counts 3 and 4 and, accordingly, the alleged tax deficiencies therefrom in Counts 1 and 2. On the four items under Counts 3 and 4 submitted to the jury by the court below: (a) the overstatement of purchases; (b) the failure to report discounts; (c) the overstatement of sales returns and allowances; and (d) the overstatement of New York State disability and group hospital expenses (A 2195a), the jury reached a verdict of guilty only on "(a) the overstatement of purchases" (A 2199a-2200a). The tax on the purchases could have been considered by itself substantial to account for the verdict of guilty on Counts 1 and 2 (A 2107a).

The Relevant Facts

Petitioners formed a partnership in a new auto parts business in Ithaca, New York, known as Cramer Auto Parts Company. In the years at issue, 1962 and 1963, the partnership operated as wholesale jobbers of auto parts whose sales consisted of approximately 75% to garages and gas stations, and 25% to institutions like

Cornell University, Ithaca College, United States and municipal governments, and others (A 1842a). Petitioner Minnie Cramer assisted the bookkeeper Doris Gray in checking invoices, writing checks, and posting to the ledgers (A 1724a). She worked part time in the office because of her duties at home with their three adopted children (A 1727a).

Petitioner Louis Cramer, her husband, to whom she had been married since 1929 (A 1833a), was 64 years of age (A 1831a). He worked in the store from 7:00 A.M. to 7:00 P.M on weekdays, until 1:00 P.M. on Saturdays, and from 8:00 A.M. to 1:00 P.M. on Sundays (A 1835a).

The partnership returns for 1962 and 1963, the years at issue, were signed by petitioner Louis Cramer and countersigned by Thaler & Thaler, attorneys, as preparers (Exs. 4, 5). The individual joint Federal income tax returns for the same years were signed by both petitioners and countersigned by Thaler & Thaler, attorneys, as preparers (Exs. 9, 10). These returns, both partnership and individual, were prepared by Judge Louis Thaler, who was the senior partner in the law firm of Thaler & Thaler (A 66a). He had been representing petitioner Louis Cramer from the early 1930s (A 68a). He was not an accountant, had not studied accounting or tax law, but he did prepare income tax returns for his clients, including petitioner Louis Cramer for the period 1951 to 1964, inclusive (A 69a). During this period of time, Judge Thaler had been a Special County Judge and Surrogate of Tompkins County from 1945 to 1962, a lecturer at Cornell University, City Attorney for Ithaca, and president of his Bar Association (A 66a). His son, Richard Thaler, who was his associate counsel, was City Prosecutor, Assistant District Attorney, and District Attorney of Tompkins County for six years (A 67a).

The material for the preparation of the partnership returns was gathered by Doris Gray, the bookkeeper, from the books and records of the partnership (A 333a, 1822a). When she completed the information on handwritten sheets, she gave the sheets to petitioner Minnie Cramer, who typed them and gave them to petitioner Louis Cramer for submission to Judge Thaler (A 119a, 1741a). Petitioner Louis Cramer submitted the sheets to Judge Thaler, who prepared a draft of the partnership returns which reflected that the gross profit (the difference between sales and cost of goods purchased) appeared to be 40% or over, which appeared to petitioner Louis Cramer to be in excess of the gross profit in his industry of not more than 30% to 33% based upon petitioner Louis Cramer's knowledge and experience in the business, the information supplied to him by manufacturer representatives who sold the automobile parts to him and what the industry national averages revealed (A 58a, 80a-81a, 108a-109a). Judge Thaler advised petitioner Louis Cramer that an adjustment should be made on the partnership return to reflect the proper industry gross profit percentages (A 59a, 83a-84a, 85a, 102a, 92a-93a, 106a-107a). Petitioner Louis Cramer testified he was unaware of what the adjustment made by Judge Thaler consisted. He believed that the individual and partnership returns honestly and accurately reported the correct income and tax (A 1873a-1874a, 1891a-1892a). He said further he did not examine the returns but signed them in reliance on Judge Thaler (A 1864a, 1874a, 1892a).

Petitioner Minnie Cramer testified she retyped the sheets which had been originally submitted to Judge Thaler at his direction, but that this was done after the partnership and income tax returns at issue were filed (A 1780a-1781a). She said further she had no knowledge

what the adjustments were that were made by Judge Thaler at the time the returns were prepared (A 1788a-1789a). Special Agent Sager of the Intelligence Division of the Internal Revenue Service, who was respondent's main witness at the trial and the only witness in the grand jury, testified he interviewed petitioners and that petitioner Louis Cramer told him that he had made the actual adjustments to the purchases, not Judge Thaler, and that petitioner Louis Cramer did not inform Judge Thaler about the changes that were made (A 1025a-1026a, 1537a). The special agent likewise said that Richard Thaler told him that the adjustments to the purchases were made by petitioner Louis Cramer (A 1025a). He testified further that Judge Thaler had told him he reviewed the items on the tax returns with appellants before they signed them, but that Judge Thaler told him this orally, although the contrary appeared in Judge Thaler's affidavit he received (A 1546a-1548a). Both Judge Thaler and Richard Thaler, as well as petitioners, denied these statements. In addition to these alleged admissions, Special Agent Sager also testified as to other claimed admissions made by petitioners which were relied upon by the respondent in its proof to support the alleged deficiencies in tax and the alleged false statements on the partnership returns. Special Agent Sager destroyed his notes and the notes of Revenue Agent Hurban (A 1556a-1557a), who was present at the time Special Agent Sager interviewed petitioners and obtained the alleged admissions testified to. He prepared for the trial an "aide memoir" from which he testified (A 955a, 1518a-1519a), and which in numerous instances was materially inconsistent with his "reports" (A 1001a, 1519a-1523a). He also claimed memory of events not found in his "reports" (A 1489a-1490a, 1548a, 1553a-1555a). As has been

indicated, Special Agent Sager was the major prosecution witness. He was a skilled criminal investigator, aware of the significance of admissions from a taxpayer, and the procedures in court (A 1523a-1524a). It was Sager's testimony as to the petitioner's purported, though denied, admissions which engrafted the issue of *mens rea* to those facts. He was the only witness in the grand jury (A 1427a). When petitioners requested an inspection of his grand jury minutes, the trial court ordered the prosecutor to produce them (A 337a). The prosecutor indicated that his grand jury testimony had not been recorded and was therefore unavailable. The prosecutor further stated:

> "As of the date of the indictment herein, to wit, March 27, 1969, minutes of grand jury proceedings were not taken in this District, *except in major criminal cases.*" (A 2380a; emphasis added)

In only one instance that petitioners sought to chance a question on the cross examination as to what the special agent testified to in the grand jury did it appear that erroneous and false testimony was given by the special agent to the grand jury with respect to the alleged overstatement of some of the expenses on the partnership returns (A 1458a-1459a).

REASONS FOR GRANTING THE WRIT

1. The split decision below destroys the growing and salutary trend since this Court's opinion in *Dennis v. United States*, 384 U. S. 855, 86 S. Ct. 1840 (1966) that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

The above quotation is taken from this Court's decision in *Dennis* v. *United States*, 384 U. S. *supra* at 871, 86 S. Ct. *supra* at 1849, which stressed the importance to a defendant in a criminal case of the necessity for an inspection of a witness' grand jury testimony in the event inconsistencies existed between his trial testimony and that before the grand jury. This Court added further:

> ". . . it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." 384 *supra* at 873, 86 S. Ct. *supra* at 1851.

A panel of the Court below in *United States* v. *Youngblood*,* 379 F. 2d 365, 370 (2d Cir. 1967), interpreted the

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* Of this panel of Circuit Judges Waterman, Friendly and Feinberg that decided *Youngblood*, Judge Waterman was not an active Judge when the petition for a hearing *in banc* was decided, Circuit Judge Friendly wrote the opinion for the majority, and Circuit Judge Feinberg voted in favor of the petition for rehearing *in banc*.

principles announced in *Dennis* v. *United States* to require disclosures of a witness' grand jury testimony as a matter of right. So did the Seventh Circuit in *United States* v. *Amabile,* 395 F. 2d 47 (1968). In referring to this trend, the Circuit Court for the District of Columbia in *Gaither* v. *United States,* 413 F. 2d 1061, 1084, said:

> "Both the Second and Seventh Circuits have furthered this trend by decreeing in their supervisory power that defendants should have automatic access to the grand jury testimony of Government witnesses at trial, except where the Government can show an overriding case for secrecy, such as national security. United States v. Youngblood, 2 Cir. 379 F. 2d 365 (1967); United States v. Amabile, 7 Cir. 395 F. 2d 47 (1968). Both *Youngblood* and *Amabile* became effective for trials beginning the day after the decisions came down. Thus, in their immediate effect on the demand for grand jury transcripts, they were virtually identical with our first opinion in this case—almost all defendants in trials starting the morning after the decision and thereafter had the right to demand grand jury transcripts. Yet no claims of governmental inability to cope with this situation are recorded in or after those decisions; indeed in *Amabile* the Government concurred in the adoption of the *Youngblood* rule. *Apparently in those Circuits, Dennis was seen as the handwriting on the wall, and arrangements were made to have transcripts of grand jury minutes ready for trial.*" (Emphasis added.)

Other Circuits that once took a narrower view of the necessity of providing a defendant with "the relevant materials" followed the trend laid down by this Court, as

can be seen in *Cargill* v. *United States*, 381 F. 2d 849 (10th Cir. 1967); *National Dairy Prod.* v. *United States*, 384 F. 2d 457 (8th Cir. 1967); *Allen* v. *United States*, 390 F. 2d 476 (D. C. Cir. 1968). While this Court's opinion in *Dennis* v. *United States* was not predicated specifically upon constitutional grounds, the effective deprivation of material for impeachment purposes is, it is respectfully submitted, inconsistent with the procedural guarantees of due process under the Fifth Amendment and of the right of confrontation under the Sixth Amendment.

The withholding of the grand jury minutes which contains information necessary and vital to determine the credibility of a principal Government witness is comparable to "the suppression by the prosecution of evidence favorable to an accused", which this Court condemned in *Brady* v. *State of Maryland*, 373 U. S. 83, 87-88, 83 S. Ct. 1194, 1196-1197 (1963), as violative of due process "irrespective of the good faith or bad faith of the prosecution."

The force and impact of this trend to make available grand jury testimony of a Government witness for trial purposes resulted in the trial court in the instant case announcing a new rule for prosecutors in the Northern District of New York that henceforth indictments would be dismissed where grand jury testimony was not recorded (A 1473a). A similar policy was announced in *United States* v. *Gramolini*, 301 F. Supp. 39, 41-42 (D. C. R. I. 1967), where Judge Pettine very significantly noted:

> "In eighteen years of practice as a prosecutor, I presented to both state and federal grand juries hundreds, even thousands of cases, covering every facet of crime, from petty offenses to organized activities of the underworld, from voting frauds to

> alleged graft and corruption of power-wielding city-officials. In not a single major instance were minutes not kept either electronically or manually. Against this background, I unequivocally reject the notion that recordation of grand jury proceedings interferes with the proper functioning of the grand jury. In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might, in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses. Nor can it be claimed that the cost of recordation is prohibitive; in an electronic age, the cost of recordation must be categorized as miniscule. Indeed, even if a stenographic transcript be kept, the cost is clearly justified by the improved administration of criminal justice. For these many reasons, I rule as a matter of federal criminal procedural law pursuant to Fed. R. Crim. P. 57(b) that it is the law of this case grand jury proceedings should have been transcribed or otherwise equally effectively recorded."

The split decision below, however, will result in reversing this tide. It will be an invitation to those prosecutors in the Eastern and Southern Districts of New York, and elsewhere in the Second Circuit, where the policy of recording grand jury testimony of witnesses has existed, to refrain from doing so. It will even permit the prose-

cutor in the Northern District of New York, who announced at the argument of the appeal below that their practice is now to record in all cases, to go back to their old ways and record grand jury testimony only in such cases as the prosecutor in his unfettered discretion decides.

It seems without question that this claim of right to arbitrarily, and in a prosecutor's unfettered discretion, withhold the grand jury testimony of a witness by not recording it is comparable to the existence of the type of power in the Government condemned by this Court as violative of due process or of the equal protection clause under the Fourteenth Amendment to the Constitution in such cases as *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 74 S. Ct. 499 (1954); *McLoughlin* v. *State of Florida*, 379 U. S. 184, 85 S. Ct. 283 (1964); *Service* v. *Dulles*, 354 U. S. 363, 77 S. Ct. 1152 (1959); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064 (1886).

Furthermore, the split decision will enable those prosecutors who are more zealous of victory than justice to abandon the practice of recording grand jury testimony since in this Circuit the only restriction now imposed is proof of "prosecutorial misconduct," a standard that is vague and impossible to prove. Cf. *Giaccio* v. *State of Pennsylvania*, 382 U. S. 399, 86 S. Ct. 518 (1966), where this Court deemed such words as "misconduct" or "reprehensible" conduct to be so vague as to constitute a denial of due process as contained in a statute which imposed penalties. It is difficult, moreover, to conceive any greater proof of misconduct on the part of the prosecutor in the Northern District of New York when he admits that grand jury minutes were only kept and recorded in major criminal cases.

If petitioners have a right to confront Special Agent Sager with his grand jury testimony, a right the prosecutor was well aware of after this Court's opinion in *Dennis* v. *United States, supra,* and *United States* v. *Youngblood, supra,* is it not misconduct on his part to deprive petitioners of the grand jury testimony by simply ordering the grand jury testimony not to be recorded? Is this not a "suppression by the prosecution of evidence favorable to an accused," which this Court held in *Brady* v. *State of Maryland, supra,* violated due process "irrespective of the good faith or bad faith of the prosecution?"

The principles laid down by this Court in *Dennis* v. *United States* and *Brady* v. *State of Maryland* will be completely eroded, if the standard for the application of those principles is the existence or non-existence of "prosecutorial misconduct", whatever that means.

Petitioners respectfully submit that those Circuits which have sanctioned the rule announced below have departed from the salutary principles laid down by this Court. Judge Oakes in his dissenting opinion below sufficiently and ably analyzes these decisions, some of which, he concludes, rely on "pre-Dennis cases" and others on a complete misinterpretation of the import and extent of this Court's opinion in *Dennis* v. *United States.*

Petitioners in the Court below, as well as in this Court, do not espouse a rule which requires any retroactive basis as the Court below feared. Petitioners seek a disposition of this case which will enable them to obtain a new and fair trial without the testimony of the special agent whose testimony as to damaging admissions of the petitioners could not be properly tested because of the prosecutor's failure to record his grand jury tes-

timony. This is the only sanction petitioners seek, which is a small price to pay for "the suppression of evidence favorable to an accused."

The opinion of Judge Oakes further indicates that the majority opinion violates Rule 6(d) of the Federal Rules of Criminal Procedure. Unless Rule 6(d) was intended to require the recording of grand jury testimony, it is difficult to understand why the Rule provided for the presence of stenographers or operators of recording devices "for the purpose of taking the evidence."

The grant of certiorari, thus, becomes not only appropriate but imperative in order to forestall any further violation of Fifth and Sixth Amendment rights and any further tendency to impede and weaken salutary principles announced by this Court to promote the proper adminsitration of justice.

2. The trial court's charge to the jury that they may draw the inference that petitioners had knowledge of the contents of the returns solely from the fact that they signed them was in substance a violation of the presumption of innocence; it was beyond the statutory effect to be given a signature on a tax return and it placed the Second Circuit squarely in conflict with the Sixth and Seventh Circuits.

The decision below is a departure from and in conflict with this Court's previous decisions defining the standard of wilfulness which is required in proving a violation of Sections 7201 and 7206(2), Title 26, U.S.C. The trial court charged the jury that they may draw the inference that petitioners had knowledge of the contents of the tax returns, if they find that the prosecution had

proved beyond a reasonable doubt that they signed the returns. Petitioners took exception, requesting the trial court to charge their Request No. 37 which incorporated the language in *Lurding* v. *United States,* 179 F. 2d 419, 422, (6c, 1950) mentioned hereafter (A 2336a, A 2145a-A2146a, A2156a-A2157a).

Under Section 6064 of Title 26, U.S.C. (I.R.C., 1954), Congress has provided that when an individual's name is signed to a return, that fact "shall be prima facie evidence for all purposes that the return . . . was actually signed by him." Nowhere did Congress further provide, as the trial court charged below, that an inference of knowledge of the contents of the returns can be presumed from such signature alone. Although specifically raised on brief below, the conviction was affirmed without mention of the point.

The wilfulness required under Section 7201 of Title 26, U.S.C., has been defined by this Court's opinion in *Holland* v. *United States,* 348 U. S. 121, 139, 75 S. Ct. 127, 137 (1954) to require a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. See also *United States* v. *Murdock,* 290 U. S. 389, 54 S. Ct. 223 (1933); *Sansone* v. *United States,* 380 U. S. 343 (1965). Such wilfulness has been equated with a bad purpose or corrupt motive. *United States* v. *Murdock,* 290 U. S. *supra,* p. 394. Similarly, with respect to the alleged false statement on the partnership return under Section 7206-(2), Title 26, U.S.C., the wilfulness has been uniformly defined as that set forth in *Edwards* v. *United States,* 375 F. 2d 862, 865 (9th Cir. 1967), where the Court stated:

> "The offense to which this section is directed is not evasion or defeat of tax. Rather it is falsifi-

> cation and the counseling and procuring of such deception as to any material matter. Here the falsification was committed deliberately, with full understanding of its materiality; with intent that it be accepted as true and that appellant thereby gain the end he sought. This in our judgment is sufficient to constitute willfulness under this section."

Inasmuch as the issue of petitioners' knowledge and intent with respect to the accuracy of the partnership and individual returns was put in issue by their testimony that they were unaware of the contents of these returns and the adjustments made by Judge Thaler, their attorney on whom they relied, the trial court's charge may have been sufficient in and of itself to have been the result of the verdict of guilty against petitioners on all counts.

In discussing petitioner Minnie Cramer's claimed lack of kwowledge, the court below, for example, said:

> "The jury was entitled to disbelieve this."

While it is true that this issue was one for the jury, nevertheless the jury was not advised that they should consider all the circumstances in arriving at such a determination. They were told that they could infer such knowledge merely from the fact that she and her husband had signed the returns.

The trial court's charge, it is submitted, was not only contrary to the requirement of a specific intent and knowledge, which this Court has established previously as the proper proof to support wilfulness under these statutes, it was also in conflict with *Lurding* v. *United States,* 179 F. 2d 419 (6th Cir. 1950), and *United States* v. *Bass,*

425 F. 2d 161 (7th Cir. 1970). The Seventh Circuit in *United States* v. *Bass,* in reversing the conviction, stated at page 162:

> ". . . we conclude that it is improper to charge a taxpayer with conclusive knowledge of the contents on the basis of the signature alone. Knowledge may be inferred from the facts and circumstances of the case and certainly the signature at the bottom of the tax return is *prima facie* evidence that the signor knows the contents thereof. *See* United States v. Gainey, 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965). The court's instruction created a conclusive presumption and it was in error."

Similarly, in *Lurding* the Sixth Circuit stated at page 422:

> "The act here involved is the filing of an inaccurate return. In the complexity of successive tax laws, many thousands of taxpayers do that innocently. Such filing is unlawful, however, only if made wilfully, with knowledge of its falseness and with intent to evade taxes. There is no presumption that may be drawn from the act itself—both knowledge and wilfulness must be established by independent proof, direct or circumstantial. Compare Heindel v. United States, 6 Cir., 150 F. 2d 493."

It is respectfully submitted that the decisions of the Sixth and Seventh Circuit Courts properly follow the correct rule previously announced by the decisions of this Court.

Congress provided that a signature on the tax return was presumptively the signature of the taxpayer. Con-

gress did not proceed further than that. To construe such a limited presumption as to permit the further presumption that the signor had knowledge of the contents of the return is to impute to Congress matter that was not intended and was significantly omitted. In charging the jury to the contrary, by directing that the jury could draw an inference of knowledge of the contents of the return merely from the signatures on the return the charge destroyed petitioners' presumption of innocence and was contrary to respondent's burden to prove specific intent and knowledge by independent evidence.

This Court has observed that as to any instruction given a jury, "it must be presumed that the jury conscientiously observed it." *Shotwell Mfg. Co.* v. *United States,* 371 U. S. 341, 367 (1963). While the trial court did in fact charge the jury substantially in the language that this Court required in proof of a specific intent, the trial court nevertheless improperly charged the jury in addition that they could infer such knowledge and intent from the mere signature on the return (A 2105a). It is, therefore, impossible to determine which instruction the jury followed. As previously held by this Court in *Yates* v. *United States,* 354 U. S. 298, 312, a jury verdict must be set aside "where the verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected."

With the exception of *United States* v. *Wainright,* 413 F. 2d 796, 802 (10th Cir. 1969), which seems to support the charge of the trial court below, no other case has been found to support it.

As a result of the substantial number of criminal tax cases that exist and will continue in the future, the affirmance by the Court below of this charge by the trial

court presents an important principle which will recur time and again in the trial of these matters. The grant of certiorari is accordingly appropriate to resolve this conflict and to remove the undue confusion generated by the affirmance of the conviction below.

CONCLUSION

For these various reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS BENDER,
KOSTELANETZ & RITHOLZ,
THALER & THALER,
Counsel for Petitioners.

October 15, 1971.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 719 and 720—September Term, 1970.

(Argued June 7, 1971 Decided July 23, 1971.)

Docket Nos. 35267 and 35268

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS CRAMER and MINNIE K. CRAMER,

Defendants-Appellants.

Before:

FRIENDLY, Chief Judge,
HAYES and OAKES, Circuit Judges.

Appeal from a judgment of the District Court for the Northern District of New York, Edmund Port, Judge, convicting appellants, after a verdict, on all counts of a four-count indictment charging them with tax evasion, 26 U.S.C. §7201, and assisting in the preparation of false tax returns, 26 U.S.C. §7206(2). Affirmed.

Appendix A

LOUIS BENDER, ESQ., New York, New York (BORIS KOSTELANETZ and RICHARD B. THALER, of Counsel), for Appellants.

JAMES M. SULLIVAN, JR., ESQ., United States Attorney, Northern District of New York, Syracuse, New York 13201, for Appellee.

FRIENDLY, Chief Judge:

Louis Cramer and his wife Minnie, partners in an auto parts business in Ithaca, New York, appeal from their conviction after a jury trial in the District Court for the Northern District of New York, of willful tax evasion, 26 U.S.C. §7201, and willful assistance in the preparation of false tax returns, 26 U.S.C. §7206(2). The four-count indictment charged in substance that the Cramers had understated by $74,839.61 their taxable income on their joint income tax return for 1962 (Count 1) and by $55,466.70 for 1963 (Count 2), and that, with respect to the same tax years, they had willfully assisted in the preparation of their materially false partnership returns by (1) overstating purchases, (2) failing to report purchase discounts, (3) overstating sales returns and allowances and (4) overstating New York Disability and Group Hospital Expenses (Counts 3 and 4). The jury returned a verdict of guilty on all four counts against each defendant, although the basis of its decision on Counts 3 and 4 was limited to "reported purchases of merchandise."[1] The defendants received the sentences stated in Part VI below.

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[1] The form of verdict submitted to the jury permitted it to indicate the specific basis or bases on which its finding of guilt with respect to Counts 3 and 4 were predicated. The jury returned a verdict "based on section (a) Reported purchases of merchandise." We read this as meaning that the jury did not find the Cramers guilty with respect to the errors "(b)", "(c)," and "(d)," in reporting the purchase discounts, the sales returns and allowances, and the hospital and disability expenses.

Appendix A

For many years, Louis and Minnie Cramer were partners in Cramer's Auto Parts Co., a wholesale jobber of auto parts whose sales were principally to garages and gas stations. Louis waited on the trade behind the counter and purchased the parts sold in the store; Minnie helped in the office and assisted in the bookkeeping. During the years in question, Judge Louis Thaler, senior partner in the law firm of Thaler and Thaler, prepared the Cramers' tax returns on the basis of information they supplied to him.

The stimulus for the investigation that led to the prosecution of this case was a similar investigation undertaken by the New York State tax authorities. As a result of the latter, a settlement was reached whereby the Cramers paid a 5% negligence penalty in addition to the tax (and interest) due the State. Apparently pursuant to an agreement between state and federal tax authorities, the Internal Revenue Service was notified of the state examination and settlement, and the Service then commenced its own investigation.

The federal investigation was undertaken by Agents Hurban and Sager. Agent Hurban examined the books and records of Cramer's Auto Parts Co.—consisting of the cash disbursements journal, the cash receipts journal, the cancelled checks, bank statements, and sales invoices. A comparison of the results of this examination with the figures reported on the Cramers' partnership returns revealed, with respect to the items specified in Counts 3 and 4, unreported income in the amounts specified in Counts 1 and 2. In addition, a number of conferences were held between the agents and the Cramers, Judge Thaler, his son and associate Richard, and James Barrett, an accoun-

tant hired by Thaler and Thaler in connection with the New York State investigation. In the course of these meetings, the agents obtained information concerning appellants' financial picture during the years in question as well as the manner in which the returns were prepared. On the basis of information so obtained, and much documentary evidence, proof was adduced at trial to corroborate the specific deficiencies in reported income by showing an increase in appellants' net worth and expenditures above that reported as taxable income (and unexplained by increases from non-taxable sources) of about $74,000 for 1963 and $38,000 for 1963.[2]

Appellants did not take issue with the factual accuracy of the asserted deficiencies in reported income resulting from the failure to report purchase discounts, the overstatement of sales returns and allowances, and the overstatement of New York Disability and Group Hospital Expenses. They claimed that these were a function of errors by others on whom they relied to prepare their returns, or the underlying figures therefor), a claim the jury apparently believed. See fn. 1 *supra*. With respect to the overstatement of purchases which constituted the bulk of the deficiency; however, the appellants contended that they properly reduced the gross profit margin reflected on their own books and records (by an upward adjustment in the figures for purchases) to one in accord with the national average for auto parts wholesalers, be-

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[2] The net worth "bulge" for 1962 was almost identical to that proved by the specific item method; the "bulge" for 1963 was $17,000 less than that proved by the specific item method.

cause the former was "way out of line" with the latter. Alternatively, they contended that even if the method was not proper, they relied on the advice of their attorney, Judge Thaler, who informed them that it was—a contention, which, if believed, would tend to negate the element of "willful" tax evasion which the Government was required to prove.

As to the net worth proof, appellants' principal contention relates to the use of the inventory figures on which the Government relied in part in establishing valuations of appellants' assets at the beginning and end of the years in question. Although the Government employed the inventory figures reported on appellants' tax returns, it is now contended that these inventories were obsolescent and use of them in a net worth analysis would necessarily overestimate appellants' net worth.

While this it but a crude outline of the detailed factual presentation at trial, the relevant details may be more appropriately developed in the context of appellants' legal contentions.

I. *The Failure to Record the Grand Jury Testimony*

Agent Sager was apparently the only witness who testified before the grand jury which returned the indictment against the Cramers. According to the Government's memorandum in the district court, "[a]s of the date of the indictment herein, to wit, March 27, 1969, minutes of grand jury proceedings were not taken in [the Northern] District, except in major criminal cases." Since the instant prosecution presumably was not deemed to be a "major criminal case," no stenographer was present to record Agent Sager's grand jury testimony, and consequently this was not available for possible use as impeach-

ment. Appellants claim that this failure constituted a denial of due process.

The Cramers rely principally on our decisions in *United States* v. *Youngblood*, 379 F.2d 365 (2 Cir. 1967), and *United States* v. *White*, 417 F.2d 89 (2 Cir. 1969), *cert. denied*, 397 U. S. 912 (1970), for the proposition that we have established a rule in this circuit requiring that all grand jury testimony be recorded. In *Youngblood*, we directed that at trials commencing after June 21, 1967, the date of our judgment in that case:

> the district courts of this circuit at the request of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial without requiring him to show any particularized need for this material.

379 F.2d at 370. We also noted, *id.* at n. 4, that

> [i]t is our understanding that stenographic minutes of grand jury proceedings in our circuit are now regularly taken and filed away. However, this may not have always been the practice, and where it has not been we do not imply that a defendant is entitled as of right to minutes that do not exist.

Two years later in *White*, a case arising in the Northern District and involving the nonrecordation of the grand jury testimony of one of the key prosecution witnesses, we held the trial testimony of the witness admissible, but noted that "[h]ad this failure [to record the grand jury testimony] occurred subsequently to our decision in *Youngblood*, . . . very possibly a different question would have been presented." 417 F.2d at 92.

Appendix A

In *United States* v. *Ayers*, 426 F.2d 524 (2 Cir.), *cert. denied*, 400 U.S. 842 (1970), we were presented with a district judge's refusal to order the transcription of post-*Youngblood* grand jury testimony which had been recorded. We there held that "such an order is a matter of discretion for the trial judge, depending upon the circumstances of the particular case." 426 F.2d at 529. In support of this conclusion we noted that "[a]lthough recordation as a matter of course certainly is the better procedure, . . . this combination of rule and footnote in *Youngblood* [quoted above] does not require in terms that all grand jury testimony be recorded" and that "[f]ailure to record testimony given before a Grand Jury seems still a matter about which a defendant has no right to complain." 426 F.2d at 529 and n. 1. Hence, while *Youngblood* made it clear that a defendant is entitled as a matter of right to examine the transcribed grand jury testimony of witnesses who testify at trial, insofar as this relates to their trial testimony, *Ayers* makes it equally plain that a defendant is not entitled to a reversal of his conviction simply because testimony before the grand jury which returned an indictment against him has not been recorded. This is the position taken by every court which has considered the problem, see, e.g., *Nipp* v. *United States*, 422 F.2d 509 (10 Cir. 1969), *cert. denied* sub nom. *Bishop* v. *United States*, 397 U.S. 1008 (1970); *Loux* v. *United States*, 389 F.2d 911 (9 Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States* v. *Turner*, 274 F. Supp. 412 (D. Tenn. 1967); see also *United States* v. *Caruso*, 358 F.2d 184 (2 Cir.), *cert. denied*, 385 U.S. 862 (1966) (pre-*Youngblood*), and is in accord with the permissive language of F. R. Cr. P. 6(d) which states that "a stenographer or operator of a recording device *may* be present while the grand jury is in session" (emphasis supplied).

Moreover, this would be the worst possible case in which to announce, on a retroactive basis, a *per se* rule of exclusion of the testimony of a witness whose grand jury testimony was not recorded. Shortly after each conference between the agents and appellants, their attorneys, and their accountant, Agent Sager prepared detailed memoranda recording what transpired. These made reference to such matters as Louis Cramer's admission that he made the adjustment to purchases without informing Judge Thaler—an item in Sager's trial testimony on which appellants particularly rely in asserting that the unavailability of his grand jury testimony prejudiced them. But inasmuch as these reports, prepared prior to Sager's grand jury testimony and turned over to the defense pursuant to 18 U.S.C. §3500, were fully consistent with his trial testimony, it would be perverse indeed to predicate a reversal of the conviction on the remote possibility that Sager might have presented the grand jury with a version of the facts different from that reported contemporaneously in his memoranda and later at trial. While appellants raise the spectre of arbitrary and discriminatory prosecutorial conduct in selecting those cases in which grand jury testimony will be recorded, it will be time enough to deal with such a problem when, as, and if a defendant comes forth with any evidence suggesting bad faith on the part of the Government—something appellants have utterly failed to do here.

We do not mean to imply by the above discussion that we approve of the practice which has been and, so far as we have been informed, still is followed in the Northern District. We reiterate that "recordation as a matter of course certainly is the better procedure." We hold only that the failure to record grand jury testimony of a prose-

cution trial witness—at least absent any evidence of prosecutorial misconduct—does not constitute a sufficient ground for reversal. Formulation of a general principle that all grand jury testimony must be recorded is a matter which may more appropriately be disposed of in the current revision of the Federal Rules of Criminal Procedure or by the Circuit Councils in the exercise of their supervisory power.

II. *Adjustment of Purchases on the Partnership Return to Reflect the National Gross Percentage of Profit for the Industry*

Appellants assert that both by his "disparaging and disruptive remarks" and by his charge, the trial judge interfered with an effective presentation of the defense contions. The only claim of even colorable merit under this rubric involves the propriety of appellants' upward adjustment of purchases on their partnership return in order to bring their gross percentage of profit into line with the industry average.

During the years in question, Louis Cramer provided Judge Thaler with the data, derived from the books of Cramer's Auto Parts Co., so that the latter could prepare the Cramers' tax returns. After preparing rough drafts of the returns for 1962 and for 1963, Judge Thaler informed Louis Cramer that the books revealed a gross profit figure of approximately 40%. Cramer responded that "it was impossible with the discounts I give, and what we sell the material for, and what the national average was. It runs 30 percent. The best I could do was 31." Agent Sager testified that Cramer told him that, without informing Judge Thaler, he "made the adjustments"—in-

creasing the purchase figures and thereby reducing his gross profit margin to approximately 30%, in line with the industry average. Judge Thaler, whose testimony contradicted Sager's with respect to who made the actual changes in the purchase figures, explained that he made the adjustments "based on information which was submitted to me, and which was, as I believe, the national average, and was informed was the national average." When questioned as to the propriety of making such an adjustment, Judge Thaler responded that "I felt it was my duty to make a return the way it was indicated it should be made. If it was his [Louis Cramer's] belief, and I had no reason to disbelieve him, if it was his belief that his was the same as the national average, I felt it was my duty to do it that way." When questioned further as to whether the percentage-of-profit figure was reached on the basis of actual purchases, Judge Thaler replied: "No, it was figured on the basis of the national average as I understand the Commissioner does." Later in the course of the trial, after hearing additional testimony concerning appellants' method of calculating their partnership income, the court instructed the jury that "income tax returns are not based on averages, they are based on figures, except where the Internal Revenue Code permits certain fixed averages, such as in relation to local taxes and things of that nature." Appellants argue that this instruction was erroneous and that it removed one of their principal contentions from the jury's consideration.

It is not disputed that an upward adjustment in the purchase figures, as reflected in appellants' books and records, was made on their partnership returns in order to arrive at a gross percentage of profit for Cramer's Auto

Parts which was more in line with the industry average than the percentage actually disclosed. Appellants nevertheless urge the somewhat novel contention that *despite the existence of detailed books and records,* a taxpayer may properly disregard these figures when the profit margin they disclose is substantially higher than the industry average.

In support of this proposition, appellants refer us to two cases in which a taxpayer, on his own initiative, has adopted a gross percentage of profit method in calculating his income. *Gordon D. Seigle,* 33 T.C. 255 (1959), *rev'd on other grounds,* 281 F.2d 372 (4 Cir. 1960), and *United States* v. *Kiamie,* 258 F.2d 924 (2 Cir.), *cert. denied,* 358 U.S. 909 (1958). It is true that in *Seigle,* the Commissioner did not contend that the use of a percentage of sales method for determining cost of goods sold was erroneous, although he did prevail on his contention that the figure used by the taxpayer was not a proper one. But the crucial fact in that case was that the taxpayer kept no records which would have allowed the use of a "permissible method," 26 U.S.C. §446(c), of accounting:

> No inventories were ever taken . . . no attempt was ever made to allocate cost to the various portions of the original bulk purchase.
>
> . . . There were insufficient records and data to enable the Commissioner to reconstruct any opening or closing inventory. Under these circumstances [the Commissioner] had to adopt some method that would allow [the taxpayer] to recover costs and clearly reflect the income.

33 T.C. at 260. Here, by contrast, inventories—of which more hereafter—were taken, and although the record indi-

cates that appellants' method of accounting left room for improvement in some respects, James Barrett testified that the books "were of high quality, as far as they went. As a matter of fact, the cash receipts and disbursements records, I think, were superior. They were better than the 99 percent of the kind of records we find in a business of this size."

Kiamie likewise does not support the proposition that a taxpayer possessing detailed books and records may unilaterally ignore these in favor of an industry-wide average. No claim was made that the use of a gross percentage of profit method, there employed in order to eliminate alleged distortions in income resulting from intercorporate transactions, was proper as a matter of law. Rather it was offered, and properly so, as a defense to criminal charges —since the jury was entitled to believe, regardless of the propriety of the procedure, either that the gross profit figure accurately reflected income or that the defendants acted in good faith in using it.[3] The trial court's charge adequately apprised the jury of these very defenses:

> [T]he Defendant Louis Cramer contends that the partnership from which substantially all of the joint

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[3] In *Kiamie*, the trial court did not permit the introduction of extensive proof relating to the "intercorporate sales defense" for lack of proof that the corporations used an honest gross profit percentage figure based on "their experience." This court noted, in affirming the conviction, that "Proof that returns were made out by use of an honest gross profit percentage figure calculated in good faith was central to appellants' defense. Requiring appellants to prove an essential element of their defense did not confront them with a new charge or shift the burden of proof." 258 F.2d at 929.

> income was derived, could not have had the gross profit tentatively computed by Louis Thaler because it exceeded the margin of profit on which he and the industry generally operated. He explained to us just what he meant by margin of profit, the percentage of his profit against the selling price. You must determine first whether or not the Defendants received any or all part of the additional income attributed to them by the Government . . . if you find that they didn't . . . of course, you would find them not guilty.
>
> . . .
>
> If you find . . . that the Defendants relied on good faith on Louis Thaler's preparation of the returns and believed that each of the returns correctly showed the income and amount of tax due, then you must find as to such defendant a not guilty verdict, even though you find that the returns were incorrect and the Defendants owed a substantial—owed a tax substantially in excess of that shown to be due on the returns.

Finally, appellants seek to derive, from the Commissioner's statutory authority to compute taxable income under such method as, in his opinion, does clearly reflect income "[i]f no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income," 26 U.S.C. §446(b), an implied prerogative of a taxpayer to adopt, *sua sponte*, a method of computation which he believes "does clearly reflect income" when, in the taxpayer's opinion, his own books and records are "out of line" with the industry average. Section 446(e), however, makes it perfectly clear that as a general rule

> a taxpayer who changes the method of accounting on which he regularly computes his income in keeping his books shall, before computing his taxable income under the new method, secure the consent of the Secretary or his delegate.

In light of the existence of appellants' detailed books and records, there was therefore no justification as a matter of law for the Cramers to adopt, without the consent of the Commissioner, a gross percentage of profit method, and the trial court's instruction to that effect was proper. Moreover, as noted above, this very issue was presented to the jury as a matter of defense with respect to criminal intent—regardless of the propriety of the method or, indeed, its accuracy—so that the appellants were hardly deprived of having the jury consider their arguments on this score.

III. *The Net Worth Proof*

Other than appellants' conclusory and insubstantial allegations that they were prejudiced by the Government's use of a net worth analysis to corroborate the evidence of specific deficiencies in reported income, the only claim of error relates to the Government's reliance on the inventory figures revealed by appellants' partnership returns. The principal contention is that since the inventories, which were carried at cost, allegedly included many obsolete items—e.g., pre-World War II Chevrolet running boards, any reliance on inventory figures derived from appellants' records would produce a grossly inflated picture of appellants' assets—and increasingly so with the passage of time.

At the outset, it is important to note that "[t]he use of the term 'net worth' to describe the method used . . . is a

possible source of misunderstanding since it connotes 'value.' Actually, this method of prosecution for tax evasion is not concerned with value, but only with actual costs and expenditures." *United States* v. *O'Connor*, 237 F.2d 466, 473 n. 6 (2 Cir. 1956).[4] Inasmuch as there appears to be no dispute that inventory was calculated on a cost basis and that there was no change in the methods of determining quantities, costs, or valuations between opening and closing inventories,[5] the increases in the cost basis of the inventory necessarily reflect recent expenditures

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[4] In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of the year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are added to these increases, and if the resulting figure is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents taxable income.

Holland v. *United States*, 348 U.S. 121, 125 (1954).

[5] The appellants also claim that their method of taking inventory over an extended period of time necessarily overstated their inventories. Since their was no claim that this method of calculating inventory was different from that used before, or that it changed during the years in issue, it is not unreasonable to assume that the alleged errors were made consistently and thus had little or no effect on the actual increase in net worth.

and were justifiably treated as an increase in the taxpayers' assets.[6] The only question is whether the failure to take account of any marginal decrease during the taxable years at issue (since any mark-down based on pre-1962 obsolescence is irrelevant in terms of the changes in net worth during 1962-63) in the value of inventory resulting from obsolescence prejudicially distorted the Government's net worth-expenditure analysis.

While it is true that a taxpayer may exclude from his inventory goods which have become entirely unsalable, he must do so when he first learns that the goods are unsalable, he must make the determination item-by-item, and he is not permitted "to reduce values arbitrarily by eliminating a certain percentage as representing the fall in value . . . [since] [a]pproximations are not permitted." 2 Mertens, Law of Federal Income Taxation §16.24 at 57-58 (1967 rev.). Under these standards, it is highly doubtful that the alleged obsolescence would have made any appreciable difference with respect to the net worth bulges of $74,000 for 1962 and $38,000 for 1963. Moreover, the remote possibility that some reduction of taxable income might have been effected had the appellants been able to substantiate, for 1962 and 1963, some recently discovered obsolescence, is deprived of almost any significance in light of the ample proof of specific items of unreported income which the net worth analysis simply corrroborated.

Appellants' collateral argument with respect to the inventories—that the investigating agents should have pur-

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[6] Of course, if these purchases were not financed from a source of currently taxable income (it is not argued that they were financed by a current non-taxable source) the increases would be offset by either a decrease in appellants' assets or an increase in their liabilities.

sued "leads" supplied to them by appellants and their counsel, and that the failure to do so requires a reversal of their convictions, *Holland* v. *United States,* 348 U.S. 121, 135-36 (1954)—is untenable on a number of grounds. In the first place, apparently aware of the appellants' contention that the inventory figures were inaccurate, the agents explored numerous "leads" to determine the inventory figures. They examined cancelled checks against the appellants' books and records for the years 1961 through 1964 to determine the amounts of merchandise purchased; for the years 1959 and 1960, with respect to which the agents were furnished wtih no books or records by appellants, the agents examined the microfilmed checks of Cramer's Auto Parts Co. at the First National Bank & Trust Co. of Ithaca; in addition, a number of suppliers of Cramer's Auto Parts Co. were contacted to ascertain whether they had records of Cramer's purchases—and all but one of those that did testified at trial. Moreover, according to Sager's testimony he had requested the inventory records from Richard Thaler, but was informed by him that there were none available. When these were produced as defense exhibits at trial, Sager stated that he had never seen them before.

Secondly, even assuming that this were a case in which the Government had failed to "track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence," *Holland* v. *United States, supra,* 348 U.S. at 135-36, we are not at all persuaded that the rule of *Holland* would be applicable. That case was one in which the Government rested its proof "solely on the approximations and circumstantial inferences of a net worth computation," 348 U.S. at 135, and the basis of the rule

permitting the trial judge to consider investigated leads as true and to take the case from the jury was that the Government's case would thereby be rendered insufficient. 348 U.S. at 136. Here, irrespective of the net worth evidence, the proof of specific items was more than sufficient to take the case to the jury; hence it is questionable whether there would be any justification under the rationale of *Holland* for taking the case from the jury when the Government's net worth analysis is but one string on its bow and its proof of specific items is sufficient.

Beyond all this, the "leads" here were quite as available to the defendants as to the Government. As we said in *United States* v. *Vardine*, 350 F.2d 60, 63 (2 Cir. 1962), "it is reasonable to require the defendant, if he wishes to disprove intent and likely source, to bear the burden of going forward when he alleges that he had additional deductions not claimed on his tax return." Here appellants did little more than make a broad allegation of "25% obsolescence" in inventory—a fact which, if true, they should have supported by some concrete indications that during the tax years in question such obsolescence would have reduced their taxable income.

IV. *The Trial Court's Charge*

Appellants raise a number of objections to the charge, but only two merit comment. With respect to the net worth issue, specific reference is made to several portions of the charge which might have been stated with greater clarity. The only exception taken to this aspect of the instruction, however, concerned the question of the accuracy of the opening net worth figures and the jury's duty to disregard the net worth proof if these were not estab-

lished to a reasonable certainty—a point the court was careful to clarify to the apparent satisfaction of defense counsel. Bearing in mind the Supreme Court's admonition that

> [c]harges [in net worth cases] should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused,

Holland v. *United States, supra,* 348 U.S. at 129, Judge Port's charge satisfied these criteria. He explained the nature and the essential elements of the net worth-expenditure method of proof in terms that were comprehensible to a jury. In any event, with the limited exception noted above, appellants' vigilant trial counsel, who was at no loss to bring numerous objections to other aspects of the charge to the attention of the court, took no issue with this part of the instruction, F.R. Cr. P. 30, and we are certainly not prepared, especially in light of the proof by specific items, to characterize whatever shortcomings there might have been in the charge as plain error, F.R. Cr. P. 52(b).

In their requests to charge, the appellants sought an instruction to the effect that evidence of good reputation may alone create a reasonable doubt of guilt. The court charged that evidence of good reputation "may be considered with the other evidence in the case, and may in connection with the other evidence, be sufficient to raise a reasonable doubt in your mind . . ." An exception was taken by defense counsel. In *United States* v. *Minieri,*

303 F. 2d 550, 555 (2 Cir.), *cert. denied* 371 U.S. 847 (1962), we noted that "under certain circumstances [character] testimony alone may raise a reasonable doubt as to the defendant's guilt, and in the federal courts the defendant is entitled to such an instruction," citing *Michelson* v. *United States,* 335 U.S. 469, 476 (1948) and *Edgington* v. *United States,* 164 U.S. 361, 366 (1896). Although the appellants were therefore entitled to such an instruction, the error here, as in *Minieri,* was inconsequential since the charge "was sufficiently explanatory of the effect reputation testimony has on the prosecution's burden of proof," 303 F. 2d at 555, and in light of the Government's impressive case against appellants, the shortcoming in the charge was harmless error.

V. *The Sufficiency of the Evidence Against Minnie Cramer*

Minnie Cramer contends that, however the case may be with respect to her husband, there was insufficient evidence on which to predicate a verdict of guilty against her. The record does not support this claim. Agent Sager testified that during the course of one of the conferences, Minnie admitted that she was General Manager of the office, that she wrote checks, took care of the sales invoices, purchase invoices, and assisted the bookkeeper, that she worked on the records and compiled the figures for the income tax returns, and that she gave oral information (presumably concerning the returns) to Judge Thaler. Minnie's own testimony revealed that she had regularly typed the work-sheets provided to her by the bookkeeper, which were used in preparation of the Cramer's Auto Parts Co. tax returns; that she retyped the

top page of the worksheets, used in preparation of the 1962 and 1963 returns, on which the figure for the cost of purchases as reflected in the partnership records was lined out and a new figure inserted; and that she realized that the figure in regard to purchases for each of the two years was being changed. Although she denied that she recognized that the change was substantial or that she had any knowledge of its import, the jury was entitled to disbelieve this. Neither is the fact that the actual retyping of the adjusted purchase figures apparently occurred subsequent to the preparation of the returns conclusive that she was not fully aware of the changes when the returns were prepared. Both her own testimony and that of Agent Sager revealed abundant evidence of her intimate involvement with the affairs of Cramer's Auto Parts Co., its records, and, particularly the preparation of the underlying data for its tax returns, which clearly supports the jury's verdict that she knowingly participated in the making of false returns.

VI. *Unauthorized Pyramiding of Penalties*

Louis Cramer was sentenced as follows:

Count 1 (Willful evasion for 1962): suspended sentence with five years probation;

Count 2 (willful evasion for 1963): six months imprisonment;

Count 3 (willful assistance in the preparation of false returns for 1962): suspended sentence with five years probation to run concurrently with probation sentence imposed under Count 1, and a $5,000 fine;

Appendix A

Count 4 (willful assistance in the preparation of false returns for 1963): six months imprisonment, to run concurrently with sentence imposed under Count 2, and a $5,000 fine.

The sentences of probation are not to commence until Louis Cramer is released from confinement. Minnie Cramer received suspended sentences on all four counts with five years probation, the sentences of probation to run concurrently, and she was fined $5,000 each on Counts 3 and 4.

Appellants contend that the sentences and fines constituted an "unauthorized pyramiding of penalties." *United States* v. *White, supra,* 417 F. 2d at 93. In *White,* the appellants were convicted on four counts of willful tax evasion for four separate years under 26 U.S.C. §7201 and on four counts of making and subscribing a false return, 26 U.S.C. §7206(1) for the same years. We noted that

> Section 7206(1), although it charges an offense separate and distinct in itself, is only one part in a comprehensive scheme to prohibit and punish fraud occurring in the assessment and collection of taxes by the government. Section 7201 is the inclusive section, prohibiting all attempts to evade or defeat any tax *in any manner* . . . There follows a series of sections prohibiting specific methods of fraud in the collection and payment of taxes, all of which are separately punishable standing alone . . . Among these are . . . §7206 . . . Thus the perjury offenses charged under §7206 may separately form the basis for an indictment; but where proof

> of wilfully attempted evasion under §7201 also proves, as an incident to the wilful evasion, the preparing and subscribing of a fraudulent return, the specific form of fraudulent conduct merges into the inclusive fraud charged under §7201. To cumulate penalties beyond the maximum authorized by §7201 is, therefore, improper under these circumstances . . . .

417 F. 2d at 93-94.

Assuming *arguendo* that the charges of willfully assisting in the preparation of false partnership returns, 26 U.S.C. §7206(2) (Counts 3 and 4), are lesser offenses included within §7201 (Counts 1 and 2), the sentences and fines imposed do not violate the principle of *White*. Since the Cramers were found guilty of two counts of willful tax evasion, 26 U.S.C. §7201, they could have received maximum prison terms of five years and fines of $10,000 for each of Counts 1 and 2. When the sentences actually imposed under the companion counts for each year (Counts 1 and 3 relating to 1962, and Counts 2 and 4 relating to 1963) are considered together, it becomes clear that there was no cumulation beyond the maximum. Although Louis Cramer's probation sentences are not to commence until his release from confinement, this is perfectly proper since there is no bar to consecutive sentencing on convictions of independent violations of §7201. As to Minnie Cramer, since she received four concurrent suspended sentences of five years and a total fine of $10,000, the claim of cumulation beyond the maximum permitted by §7201 is frivolous.

Affirmed.

Appendix A

OAKES, *Circuit Judge* (dissenting):

I agree with the majority opinion except upon one point, which I believe requires reversal and remand. I think the failure of the Government to have recorded the testimony of the Government witness, IRS agent Sager, given before the grand jury, is in violation of Rule 6(d). Fed. R. Crim. P., if not the due process clause of the Fifth Amendment to the United States Constitution, previous opinions of this and other Courts of Appeals notwithstanding. Rule 6(d) says a stenographer or operator of a recording device "may be present . . ." But the rule also says that "the witness under examination . . . may be present." I wonder whether the majority would construe that phrase of the rule in the same way it has construed mention of the stenographer's presence. I would agree with Professor Wright that if discretionary and selective recording is the rule, "it ought to be changed . . . The Supreme Court has emphasized the importance to the defense of access to the transcript of the grand jury proceedings. A defendant cannot have that advantage if the procedings go unrecorded." I Wright, Federal Practice and Procedure §103 (1969 ed.).

The majority, following the language of *United States* v. *Ayers*, 426 F. 2d 524, 529 (2d Cir. 1970), says that while recording grand jury testimony is the "better procedure," it is not a requirement.[1] They rely upon the

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[1] This court's continued admonition that recordation of grand jury proceedings is "the better procedure," *United States* v. *Cianchetti*, 315 F.2d 584, 591 (2d Cir. 1963), without requiring that the "better procedure" be followed,

(*Footnote continued on following page*)

footnote in *Ayers,* 426 F. 2d at 529 n. 1, stating that "Failure to record testimony given before a Grand Jury seems still a matter about which a defendant has no right to complain." For the statement in the footnote the *Ayers* court relied upon *Nipp* v. *United States,* 422 F. 2d 509, 512 (10th Cir. 1969), *cert. denied* sub nom. *Bishop* v. *United States,* 397 U. S. 1008 (1970), two pre-*Dennis* cases in the Second Circuit and a Columbia Law Review Note, *Discovery by a Criminal Defendant of His Own Grand Jury Testimony,* 68 Colum. L. Rev. 311, 315 and n. 28 (1968). I would add to the authority of the *Ayers* footnote the similar rule of the Ninth Circuit, recently expressed in *Reyes* v. *United States,* 417 F. 2d 916 (9th Cir. 1969), although the Ninth Circuit in reaching a result like that in the *Ayers* footnote also relied upon pre-*Dennis* cases, especially our own *United States* v. *Cianchetti,* 315 F. 2d 584, 591 (2d Cir. 1963). The Tenth Circuit rule derives from *Welch* v. *United States,* 371 F. 2d 287, 294 (10th Cir.), *cert. denied,* 385 U. S. 957 (1966), which didn't deal with the arguments made herein.

The Ninth Circuit in *Loux* v. *United States,* 389 F. 2d 911 (9th Cir. 1968), suggests that where testimony has

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(Footnote continued from preceding page.)

United States v. *Ayers,* 426 F.2d 524, 529 (2d Cir. 1970), begins to cast the court in the "undesirable" posture of "helpless piety" mentioned by Judge Frank in *United States* v. *Antonelli Fireworks Co.,* 155 F.2d 631, 661 (2d Cir. 1946) (dissenting opinion). While the United States Attorney stated at oral argument that it is now the policy in the Northern District of New York to record all grand jury proceedings, his statement is no assurance that the next United States Attorney will not revert to the old policy.

not been recorded, the "storehouse" of relevant information referred to in *Dennis,* like the snakes in Ireland, does not exist. 389 F. 2d at 916. This may or may not be good Celtic history, but it is very weak logic. It might better be suggested that the prosecutor not only has exclusive access to the storehouse, but by failure to record the testimony he has thrown away the keys.

So long as we have a grand jury system, it would seem to me the recordation of witnesses' testimony is essential. It is essential in a case of this nature, where the testimony of the principal witness for the prosecution is involved, for at least two reasons. First, since *Dennis* v. *United States,* 384 U.S. 855 (1966), a defendant has been entitled to examine the grand jury testimony of witnesses against him. On this point, the Court was unanimous, holding that there was "no justification" for the District of Columbia Court of Appeals' "relying upon [the] 'assumption'" that "no inconsistencies would have come to light." 384 U.S. at 874. The Court's decision was based on the general proposition that "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." 384 U.S. at 873. In the case at bar the prosecution *did* have exclusive access to the grand jury testimony of the witness Sager, by virtue of being present, and the defense had none—to determine whether there were any inconsistencies with, say, his subsequent testimony as to damaging admissions by the defendant and by attorney Richard Thaler. The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subsequent statements including these

admissions as Jencks Act materials. But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury. Particularly where, as here, we are dealing with the customary federal agent who types up a report from original notes and then destroys the notes and testifies from his report, it is essential that a defendant be given every opportunity to determine whether, at least, the agent has been consistent with his own prior testimony.

But there is a second, perhaps more cogent reason for requiring grand jury testimony to be recorded, entirely independent of the first. The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness.[2] Without the restraint of being subject to prosecu-

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[2] We have come a long way since the time when Jefferies, *C.J.*, could imprecate a witness to tell the truth by warning that

> . . . as thou will answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth.

Lady Lisle's Trial, 11 How. St. Tr. 325 (1685), quoted in VI Wigmore, Evidence §1816 (3d ed.). Wigmore's point is that without a belief in Divine punishment for dissembling on the stand, an oath is meaningless. As we no longer disqualify a witness who does not believe in the supernatural, we would do well to look realistically at the much more imminent threat of recrimination which accompanies an awareness that one's testimony is being recorded verbatim.

tion for perjury, a restraint which is wholly meaningless or nonexistent if the tesitmony is unrecorded, a witness may make baseless accusations, accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime. In today's case it is the commercial crime of tax evasion; in tomorrow's it may be incitement to riot, conspiracy to murder, or something equally serious. It is no answer to say that the grand jury hands down only indictments, and not convictions.[3] For today, as to serious crimes, with crowded courts and crowded jails, a defendant who may subsequently be acquitted or have the charges against him dismissed, may spend a year or two or three in custody awaiting trial. See *United States ex rel. Frizer* v. *McMann*, 437 F.2d 1312 (2d Cir. 1971) (en banc). If he is fortunate enough to be a so-called "political" defendant, he may arouse sympathy and be able to advance his cause in jail or raise a large amount of bail. But if he is a typical criminal in a typical American jail, he hasn't any money, he may get only an automatic defense, he may be punished before he's even tried.

The failure to record a witness's testimony goes to the very integrity of the grand jury process. It also has consequential effects which are many and substantial.

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[3] Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. *Georgia*, 370 U.S. 375, 390 (1962). See 1 Wright, Federal Practice and Procedure §101 (1969 ed.).

Obviously, the practice of not requiring recordation deprives the trial court of any opportunity to exercise its discretion under Rule 6(e), Fed. R. Crim. P., to weigh a defendant's request for production of grand jury testimony against the traditional secrecy surrounding the grand jury. *Dennis* v. *United States,* 384 U.S. 855 (1966). The practice, certainly no less than the practice of relying solely on hearsay testimony before the grand jury, "prevents the defendant from utilizing grand jury testimony in cross-examining witnesses who will testify at the trial." *United States* v. *Arcuri,* 282 F. Supp. 347, 349 (E.D. N.Y.), *aff'd,* 405 F.2d 691 (2d Cir. 1968), *cert. denied,* 395 U.S. 913 (1969).[4] In fact, the practice could deny the defendant the opportunity to complain that the indictment was based solely on hearsay if the witness who testifies is as circumspect as the agent in *Arcuri, supra,* at 405 F.2d 692. It is of note that a defendant may have the grand jury testimony of a witness who testifies at trial *as of right* in this circuit, *if* that testimony were recorded. *United States* v. *Youngblood,* 379 F.2d 365 (2d Cir. 1967). The majority says that is all very well, but there is no

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[4] If, as Wigmore states, cross examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth, V Wigmore, Evidence §1367 (3d ed.), then the recordation of testimony might be considered fuel to help make that engine run. Indeed, in the English magistrate's and coroner's inquests, recordation has been required at least since the 1550's, 1 & 2 Phil. & M., c. 13, §4 (1554); 2 & 3 Phil. & M., c. 10 (1555), quoted in IV Wigmore, Evidence §1326, n. 1 (3d ed.), with the incidental result that recorded testimony taken at a coroner's inquest was, until 1848, when Sir John Jervis' Act, 11 & 12 Vict. c. 42 (1848) required cross-examination, admissible despite the hearsay rule.

right to have the testimony recorded. Without implying anything about the Government's good faith in this case, I am at a loss to see how the imaginary future defendant created by the majority will ever be able to prove bad faith on the part of the Government if he has no transcript of a witness's testimony from which to construct an argument that the testimony should, in good faith, have been recorded.

The benefits of having grand jury testimony recorded do not all inure to the defense. See, e.g., *United States* v. *DeSisto,* 329 F.2d 929, 934 (2d Cir.), *cert. denied,* 377 U.S. 979 (1964) (conviction sustained in part on basis of witness's prior sworn testimony before grand jury).

I cannot see how in some cases "the ends of justice" will override the desirability of secrecy in grand jury proceedings and compel disclosure, *United States* v. *Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150, 234 (1940), while in other cases production of the testimony will be precluded by the Government attorney's decision that the case is not "serious."[5] I should not have thought that the "ends of justice" could be made to turn on whether the United States Attorney chooses to have the testimony recorded.

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[5] The appellants, who received sentences of 6 months' imprisonment, 5 years' probation, $10,000 fine, and 5 years' probation, $10,000 fine, respectively, would take issue with the Government's assertion that this is not a "major criminal case."

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge.
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LOUIS CRAMER and MINNIE K. CRAMER,

Defendants-Appellants.

Appendix B

Appeal from the United States District Court for the Northern District of New York.

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

APPENDIX C

Indictment

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COUNT I

The Grand Jury Charges:

That on or about April 15, 1963, in the Northern District of New York, Louis Cramer and Minnie K. Cramer, who during the calendar year 1962 were married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing to the United States of America for the calendar year 1962 by filing and causing to be filed with the District Director of Internal Revenue for the then Internal Revenue District of Syracuse, at Syracuse, New York, a false and fraudulent joint income tax return wherein it was stated that their taxable income for the said calendar year was the sum of $43,832.63 and that the amount of tax due and owing thereon was the sum of $16,628.43; whereas, as they then and there well knew, their joint taxable income for the said calendar year was the sum of $118,672.24, upon which said taxable income there was owing to the United States of America an income tax of $66,959.27.

(In violation of Title 26, USC, Sec. 7201.)

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COUNT II

The Grand Jury Further Charges:

That on or about April 15, 1964, in the Northern District of New York, Louis Cramer and Minnie K. Cramer, who during the calendar year 1962 were married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing to the United States of America for the calendar year 1963 by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Buffalo, at Buffalo, New York, a false and fraudulent joint income tax return wherein it was stated that their taxable income for the said calendar year was the sum of $46,644.23 and that the amount of tax due and owing thereon was the sum of $18,282.26 whereas as they then and there well knew, their joint taxable income for the said calendar year was the sum of $102,110.93, upon which said taxable income there was owing to the United States of America an income tax of $55,141.64.

(In violation of Title 26, USC, Sec. 7201.)

COUNT III

The Grand Jury Further Charges:

That on or about April 15, 1963, at Ithaca, State and Northern District of New York, Louis Cramer and Minnie K. Cramer, residents of Ithaca, New York and the defendants herein, did wilfully and knowingly aid and assist in the preparation and presentation to the District Director of Internal Revenue for the then Internal Revenue District of Syracuse of the Form 1065 of the Partnership

Appendix C

Return of Cramer's Auto Parts for the calendar year 1962 which was false and fraudulent as to a material matter, in that (1) reported purchases of merchandise in the amount of $280,489.42; whereas, as said defendants then and there well knew and believed that the amount of purchases of merchandise was $233,489.42; (2) they failed to report purchase discounts; whereas, as said defendants then and there well knew and believed that they should have reported purchase discounts of $5,427.72; (3) they reported sales returns and allowances of $31,188.92; whereas, as said defendants then and there well knew and believed that they should have reported sales returns and allowances of $9,753.01; (4) they reported New York Disability and Group Hospital Expenses totaling $1,803.16; whereas, they then and there well knew and believed that they should have reported $827.18 as the New York Disability and Group Hospital Expenses deduction.

(In violation of Title 26, USC, Sec. 7206(2).)

COUNT IV

The Grand Jury Further Charges:

That on or about April 15, 1964, at Ithaca, State and Northern District of New York, Louis Cramer and Minnie K. Cramer, residents of Ithaca, New York and the defendants herein, did wilfully and knowingly aid and assist in the preparation and presentation to the District Director of Internal Revenue for the Internal Revenue District of Buffalo of the Form 1065 of the Partnership Return of Cramer's Auto Parts for the calendar year 1963 which was false and fraudulent as to a material matter, in that (1) reported purchases of merchandise in the amount of

Appendix C

$257,711.54; whereas, as said defendants then and there well knew and believed that the amount of purchases of merchandise was $227,711.54; (2) they failed to report purchase discounts; whereas, as said defendants then and there well knew and believed that they should have reported purchase discounts of $5,323.02; (3) they reported sales returns and allowances of $29,406.99; whereas, as said defendants then and there well knew and believed that they should have reported sales returns and allowances of $9,907.97; (4) they reported New York Disability and Group Hospital Expenses totaling $1,381.00; whereas, they then and there well knew and believed that they should have reported $736.34 as the New York Disability and Group Hospital Expenses deduction.

(In violation of Title 26, USC, Sec. 7206(2).)

A True Bill

_____

Foreman

_____

United States Attorney

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 28 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-540

LOUIS CRAMER and MINNIE K. CRAMER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BENDER,
225 Broadway,
New York, New York

BORIS KOSTELANETZ,
52 Wall Street,
New York, New York

RICHARD B. THALER,
309 North Tioga Street,
Ithaca, New York

Counsel for Petitioners.

Adams Press Corp., 130 Cedar Street, N. Y.—Beekman 3-1050

Order Denying Petition for Rehearing

35267

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LOUIS CRAMER and MINNIE K. CRAMER,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. The alternative motion for stay of the mandate pending determination by the Supreme Court of a petition for certiorari is granted as provided in FRAP 41(b).

HENRY J. FRIENDLY,
Chief Judge (PRH)

PAUL R. HAYS,
U.S.C.J.

JAMES L. OAKES,
U.S.C.J.
I dissent, and would grant the petition

September 16, 1971

Order Denying Petition for Rehearing In Banc

35267

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LOUIS CRAMER and MINNIE K. CRAMER,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and a vote of the circuit judges having been taken on said suggestion at the request of a judge in active service,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied. Judges Feinberg, Oakes and Timbers dissent from the denial of rehearing in banc.

HENRY J. FRIENDLY
Chief Judge

September 16, 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-540

LOUIS CRAMER and MINNIE K. CRAMER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of New York, petitioners, husband and wife, were convicted on all counts of a four-count indictment, charging them with having willfully attempted to evade and defeat their individual income tax for the years 1962 and 1963, in violation of 26 U.S.C. 7201, and with having willfully assisted in the preparation of materially false partnership returns relating to income for Cramer's Auto Parts Co., in violation of 26 U.S.C. 7206(2). Louis Cramer was sentenced to a total of

six months' imprisonment and five years' probation and was fined a total of $10,000; Minnie Cramer received suspended sentences on all four counts with five years' probation and was fined a total of $10,000 (Pet. App. 21a-22a). A divided court of appeals affirmed (Pet. App. A).

The essential facts are summarized in the majority opinion below (Pet. App. A, pp. 2a-5a) and we will not repeat them here. Essentially, the evidence at trial showed (A. 325a, 327a, 333a, 334a)[1] that petitioners had understated their taxable income by $74,839.61 on their joint income tax return for 1962 (Count 1) and by $55,466.70 on their joint income tax return for 1963 (Count 2). In addition, they had overstated the merchandise purchases by the partnership by $47,000 for 1962 and by $30,000 for 1963 (Counts 3 and 4) (A. 324a-326a).

1. Petitioners contend here, as they did below, that their conviction should be set aside because the grand jury testimony of Special Agent Sager, apparently the only witness to appear before the grand jury, was not recorded, and hence was unavailable to the defense for purposes of cross-examination at trial. It is, of course, recognized that "a defendant is entitled as a matter of right to examine the transcribed grand jury testimony of witnesses who testify at trial, insofar as it relates to their trial testimony * * *" (Pet. App. A, p. 7a). See *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2). This, however, does not entitle a person convicted of a crime to a

[1] "A." references are to the appendix in the court of appeals.

reversal of that conviction on the ground that the grand jury testimony was not recorded. See *United States* v. *Ayers*, 426 F. 2d 524 (C.A. 2), certiorari denied, 400 U.S. 842; *Nipp* v. *United States*, 422 F. 2d 509 (C.A. 10), certiorari denied *sub nom. Bishop* v. *United States*, 397 U.S. 1008; *Loux* v. *United States*, 389 F. 2d 911 (C.A. 9), certiorari denied, 393 U.S. 867; and see *United States* v. *Caruso*, 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862. As the majority below points out (Pet. App. A, p. 7a), Rule 6(d), F. R. Crim. P., states only that "a stenographer or operator of a recording device may be present while the grand jury is in session."

In view of this Court's decision in *Dennis* v. *United States*, 384 U.S. 855, requiring production of grand jury testimony on an adequate showing of need, where to do so will not invade the secrecy of the proceedings, "recordation as a matter of course certainly is the better procedure" (*United States* v. *Ayers*, *supra*, 426 F. 2d at 529, n. 1). In the instant case, however, the failure to follow that procedure plainly was not for the purpose of depriving petitioners of the grand jury testimony of Agent Sager. Rather, a decision was made not to record pursuant to a policy then in effect in the district, calling for transcription of such testimony only "in major criminal cases" (A. 2380a).[2] And, this record makes it abundantly clear that petitioners were not prejudiced

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[2] That policy has since changed and now it is "the policy in the Northern District of New York to record all grand jury proceedings" (Pet. App. A, p. 25a, n. 1).

by that determination. As explained by the majority below (Pet. App. 8a):

> Shortly after each conference between the agent and [petitioners], their attorneys, and their accountant, Agent Sager prepared detailed memoranda, recording what transpired. These made reference to such matters as Louis Cramer's admission that he made the adjustment to purchases without informing Judge Thaler—an item in Sager's trial testimony on which [petitioners] particularly rely in asserting that the unavailability of his grand jury testimony prejudiced them. But, inasmuch as these reports, prepared prior to Sager's grand jury testimony and turned over to the defense pursuant to 18 U.S.C. 3500, were fully consistent with his trial testimony, it would be perverse indeed to predicate a reversal of the conviction on the remote possibility that Sager might have presented the grand jury with a version of the facts different from that reported contemporaneously in his memoranda and later at trial. * * *

2. It is also argued that the trial judge erred in charging the jury that (A. 2105a): "Whenever the fact appears from the evidence beyond a reasonable doubt that a defendant signed a tax return, the Jury may draw an inference and find that such defendant had krowledge of the contents of such return." No objection to this instruction was made at trial,[3] how-

[3] Due to an initial misunderstanding, petitioners' counsel questioned the instruction because he thought that the court had stated that the jury *must* draw the inference (A. 2145a-2146a). When co-counsel pointed out the mistake, the objection was withdrawn (A. 2156a-2157a).

ever, and it cannot now be said that its insertion in the court's charge amounted to plain error under Rule 52(b), F. R. Crim. P.

The questioned instruction does not permit an inference of petitioners' knowledge that the returns were false, but merely states that the jury could infer from the signatures that petitioners knew what facts and figures were set forth in the returns. Unlike *Lurding* v. *United States*, 179 F. 2d 419, 422 (C.A. 6), and *United States* v. *Bass*, 425 F. 2d 161 (C.A. 7), however, on which petitioners place principal reliance, the government was not content in this case to rely on the signatures alone. As the court below indicates, independent evidence showed that the returns were prepared by an accountant from information and figures furnished to him by petitioners. Moreover, the government presented an "impressive case against [petitioners]" (Pet. App. A, p. 20a), demonstrating that the returns were false and that petitioners knew of their falsity (see Pet. App. A, pp. 9a-18a, 20a-21a). Thus, even assuming *arguendo* petitioner's claim that the instruction quoted above was erroneous, the alleged error was in any event harmless in the circumstances of this case. *Kotteakos* v. *United States*, 328 U.S. 750; cf. *Chapman* v. *California*, 386 U.S. 18, 24.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-540

LOUIS CRAMER and MINNIE K. CRAMER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

Respondent recognizes petitioners' right to access to the grand jury testimony of a witness under the force of this Court's opinion in *Dennis* v. *United States*, 384 U.S. 855 (1966), and the opinion of the Second Circuit in *United States* v. *Youngblood*, 379 F. 2d 365 (1967), but asserts that that right is extinguished when the grand

jury testimony is not recorded. Reduced to its barest terms, respondent argues that petitioners' right to the grand jury testimony of an important trial witness depends upon the prosecutor who may or may not see fit to record it; if he does not, argues the respondent, the right to the grand jury minutes vanishes. In any event, further argues respondent, the petition for a writ should be denied because petitioners were not prejudiced and the prosecutor won't do it any more.

To maintain that petitioners' access to the grand jury testimony can be dispensed with through a procedural gimmick depending upon the whim or self-indulgent policy of a prosecutor, is the first place to support a result which thwarts and frustrates a clearly defined policy laid down by this Court.

The dissenting opinion of Circuit Judge Oakes gives further answer to the respondent, it is respectfully submitted. Judge Oakes says the principle laid down by this Court in *Dennis* v. *United States* that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact," 384 U.S. at 873, which was the reason why the defendant was entitled to examine the grand jury testimony of trial witnesses, can easily be evaded where "the prosecutor not only has exclusive access to the storehouse, but by failure to record the testimony he has thrown away the keys." (App. to Pet. for Cert. p. 26a).

What Circuit Court Judge Oakes says in addition is worth repeating as a further answer to respondent:

> "The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subse-

quent statements including these admissions as Jencks Act materials.* But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury. Particularly where, as here, we are dealing with the customary federal agent who types up a report from original notes and then destroys the notes and testifies from his report, it is essential that a defendant be given every opportunity to determine whether, at least, the agent has been consistent with his own prior testimony.

"But there is a second, perhaps more cogent reason for requiring grand jury testimony to be recorded, entirely independent of the first. The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations, accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime. In today's case it is the commercial crime of tax evasion; in tomorrow's it may be incitement to riot, conspiracy to murder, or something equally seri-

---

* The prejudice which the petitioners in fact suffered are set forth in petitioners' petition for rehearing and hearing *in banc* to the Court below (at pp. 6-7). There set forth are the inconsistencies between Special Agent Sager's memorandum which he used to testify as an "aide memoir", and his report, the inconsistencies between his "reports" and his testimony, his claimed memory of events not found in his "reports", and his admitted false statement to the grand jury.

> ous. It is no answer to say that the grand jury hands down only indictments, and not convictions. For today, as to serious crimes, with crowded courts and crowded jails, a defendant who may subsequently be acquitted or have the charges against him dismissed, may spend a year or two or three in custody awaiting trial. See *United States ex rel. Frizer* v. *McMann*, 437 F. 2d 1312 (2d Cir. 1971) (en banc). If he is fortunate enough to be a so-called 'political' defendant, he may arouse sympathy and be able to advance his cause in jail or raise a large amount of bail. But if he is a typical criminal in a typical American jail, he hasn't any money, he may get only an automatic defense, he may be punished before he's even tried.
>
> *"The failure to record a witness's testimony goes to the very integrity of the grand jury process. It also has consequential effects which are many and substantial."* (App. A to Pet. for Cert. pp. 26a-28a) (emphasis added).

To the same effect see the opinion of Judge Pettine in *United States* v. *Gramolini*, 301 F.Supp, 39, 41-42 (D.C. R.I. 1967) set out in the petition at pp. 14-15.

As to the last contention by respondent that this petition for certiorari should be denied because the prosecutor in the Northern District has promised to record grand jury testimony from now on, what Circuit Judges Oakes stated is most apt:

> "While the United States Attorney stated at oral argument that it is now the policy in the Northern District of New York to record all grand jury proceedings, his statement is no assurance that the next United States Attorney will not revert to the old policy." (App. A to the Pet. for Cert. p. 25a, n.1).

II.

With respect to petitioners' second point, respondent argues that petitioners failed to object to the trial court's instruction and have in effect waived it. Respondent is correct when it recites (p. 4 n.3) that counsel for petitioners at the trial withdrew his statement to the trial court that he thought the court had used the word "must" instead of "may", but respondent is incorrect in interpreting this colloquy between trial counsel and the court as being a withdrawal of the objection to the substance of the charge given with respect to the inferences to be drawn from the mere signing of a tax return. The same counsel, in advising the court that he was mistaken in believing the court had said that the jury "must" draw the inferences, objected to any rereading of the charge as given, but instead requested specifically that the court charge the submitted instruction on this question, Request No. 37 (A. 2157a). The court further said, "that has been denied two or three times." Even prior to this interchange, counsel for petitioners had taken an exception to the court's refusal to charge Request No. 37 (A 2155a-2157a). Petitioner's Request No. 37, which recited the principle in *Lurding* v. *United States,* 179 F.2d 419 (6th Cir. 1950), and which petitioners submit is the proper rule, is completely contrary to the instruction given by the trial court on the inferences to be drawn from the mere signing of a return. Petitioners submitted this principle as the correct principle of law, which the court disagreed with, denied, and refused to instruct. The court, thus, was sufficiently alerted to the objection which petitioners had to any instruction given by the court which was contrary to that reflected in the submitted instruction, Request No. 37. *Wright,* Federal Practice and Procedure, Sec. 484, and cases cited. It cannot thus be said that counsel's failure

to specifically object to the manner in which the Court charged on that issue was a waiver of their right to raise this before this Court where it is abundantly clear that the trial court was well aware of petitioners' disagreement with the instruction he intended to give and did in fact give, which was contrary to requested instruction 37. See, for example, *Leary* v. *United States,* 395 U.S. 6, 32, 89 S. Ct. 1532, 1546 (1969); *United States* v. *O'Connor,* 237 F.2d 466, 471-472 (2d Cir. 1956).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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THALER & THALER,
Counsel for Petitioners.

December 9, 1971.